

## TN Visa Holders and Tax Residence in the US

Canadian clients frequently ask if a TN/TD Visa holder working in the US can become a US tax resident, and as a consequence, a non-resident of Canada. Many TN visa holders have been warned by attorneys and immigration authorities that claiming non-resident tax status in Canada and resident in the US violates the regulations governing TN Visas.

The answer to this dilemma is complicated by the fact that tax legislation does not necessarily follow the same rationale as immigration and often functions independently of any restrictions inherent to a particular immigration status. For example, an illegal alien living in the US for an extended period will establish US tax residence status, allowing the IRS to tax all assets held worldwide by the individual (Revenue Ruling 80-209). This illustrates the paradox that illegal immigrants who work in the US are still subject to Federal (and state) tax on their earnings even though they cannot legally work in the US.

A TN Visa, having its origin in the North American Free Trade Act (NAFTA), is a non-immigrant, temporary Visa good for one to three years, but renewable indefinitely so long as the individual is employed by a US employer who requires one of the professional skills covered under the Visa. While NAFTA Regulations allow TN Visa holders the opportunity to renew their status they also require the applicant to have the intention of remaining in the US only temporarily.

Tax legislation ignores these stipulations. An individual becomes a tax resident of the US either by the *Green Card Test* or the *Substantial Presence Test (SPT)*. Under the SPT, an individual becomes a US tax resident when they are present in the US at least 31 days in the current year AND 183 days during the 3 year period that includes the current year and the 2 years immediately before. The “days of presence” follows a peculiar counting regime that adds all the days of presence of the current year, 1/3rd of the days of the prior year and 1/6<sup>th</sup> of the days of the second previous year. If the individual has 183 days or more under this formula, they are a US resident for tax purposes regardless of the fact that a TN Visa is a “non-immigrant” Visa. Only a “closer connection” exception or the intervention of the US Canada Tax Treaty can alter this conclusion.

The tax treaty between the US and Canada recognizes that there are times that an individual will be viewed as a tax resident of both nations and it is the function of the treaty to act as a referee / tie breaker when these determinations overlap or conflict. For example, a Canadian who resides with their family in Canada but frequently works in the US more than 183 days a year generally retains their Canadian tax residency under Article IV of the US-Canada tax treaty by virtue of their “permanent abode” in Canada which is evidenced by the continued presence of the taxpayer’s family in Canada.

The IRS has specifically recognized that the SPT governs the tax residence status of TN Visa holders on their website page entitled *Taxation by Visa Type- Taxation of Nonimmigrants in TN Status*. On this information page, nothing is mentioned about the *temporary* and *nonimmigrant* nature of the TN Visa influencing the resident tax status. Concurrently, the Tax Court of Canada does not regard the TN Visa limitations when determining residence of Canadians working in the US (see *Barton v The Queen, Docket 2003-3891(IT)G October 27,28, 2005*). In Barton, a Canadian citizen worked in the US for an extended period under a TN Visa and claimed to be a non-resident of Canada for tax purposes. The Canada Revenue Agency (CRA) challenged this position on the grounds that the taxpayer’s spouse still resided in Canada in a dwelling that the taxpayer frequently visited. The most important item in the case was the fact that the petitioner’s family continued to reside in Canada, which under Article IV of the US Canada tax treaty, would distinguish the taxpayer as a Canadian resident. The TN Visa did not make the petitioner a Canadian resident because he was prevented from

becoming a US tax resident – the petitioners permanent home in Canada was the reason he remained a Canadian tax resident.